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No. 96-1400

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF CALIFORNIA, STATE LANDS COMMISSION,
Petitioner,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION, ADVISORY COUNCIL ON UNDERWATER ARCHAEOLOGY, COUNCIL OF AMERICAN MARITIME MUSEUMS, INSTITUTE OF NAUTICAL ARCHAEOLOGY, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, NORTH AMERICAN SOCIETY FOR OCEANIC HISTORY, SOCIETY FOR AMERICAN ARCHAEOLOGY, SOCIETY FOR CALIFORNIA ARCHAEOLOGY, SOCIETY FOR HISTORICAL ARCHAEOLOGY, AND SOCIETY OF PROFESSIONAL ARCHEOLOGISTS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, *ET AL.*, IN SUPPORT OF THE PETITIONER

The National Trust for Historic Preservation in the United States, the Advisory Council on Underwater Archaeology, the Council of American Maritime Museums, the Institute of Nautical Archaeology, the National Conference of State Historic Preservation Officers, the North American Society for Oceanic History, the Society for American Archaeology, the Society for California Archaeology, the Society for Historical Archaeology, and the Society of Professional Archeologists respectfully petition this Court pursuant to Rule 37.2(b) for leave to file an *amicus curiae* brief, filed simultaneously herewith, in support of the above-captioned Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.[1]

[1] The interests of the *amici* organizations are described more fully in the Appendix to the Brief.

The State of California, on behalf of the State Lands Commission, has consented to the filing of this brief, as evidenced by the letter filed with the Clerk of this Court. However, Respondent was only willing to consent to the filing of the *amicus* brief if the *amici* agreed to provide an advance copy of the brief no later than March 28, 1997. The *amici* were not prepared to comply with this request and therefore seek leave from this Court.

The National Trust was chartered by Congress in 1949 as a private, nonprofit corporation to further the historic preservation policies of the United States and to facilitate public participation in historic preservation. 16 U.S.C. § 468. Congress intended the National Trust to mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources. S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285, 2288. It is in the spirit of this charter that the National Trust seeks to express its views in this case.

The National Trust has more than 265,000 individual members and 3,500 member organizations involved in local historic preservation activities nationwide. These members have a substantial interest in upholding and enhancing the effectiveness of federal and state historic preservation laws. The National Trust also provides extensive advisory and technical services to state and local governments that have enacted archeological and historic preservation laws.

The National Trust frequently participates both as *amicus curiae* and as a plaintiff in cases involving the enforcement, interpretation and constitutionality of historic preservation laws. In addition, the National Trust testified before Congress in support of the Abandoned Shipwreck Act, and has published legal articles on the protection of historic

shipwrecks.[2] The National Trust's expertise in historic preservation law is nationally recognized. The National Trust particularly wishes to express its views as a friend of the Court because of the national importance of the issues in this case. The National Trust has monitored this case from its inception and offers the national perspective and analysis. It believes that the decision in this case negatively impacts the regulatory authority of state governments to protect their underwater historic resources.

Through its Legal Defense Fund, the National Trust advocates to secure judicial, administrative, and legislative decisions that uphold the validity and effectiveness of regulatory protections for historic properties and state legislation that facilitates historic preservation generally. The National Trust has a particular interest in the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. §§ 2101-2106, as the former President of the National Trust testified before Congress that such legislation is vital in protecting "historic shipwrecks, an irreplaceable part of America's heritage."[3] The organization has participated as *amici* in three shipwreck cases in federal court.[4]

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[2] *See, e.g.*, Thompson M. Mayes, *Current Legal Issues in the Law of Historic Shipwrecks*, 5 Preservation L. Rep. 2027 (1986); Robert Moyer, *The Law of Shipwrecks: Conflict and Controversy*, 2 Preservation L. Rep. 2072 (1983).

[3] *A Bill to Protect Historic Shipwrecks; Hearing on S. 858 & H.R. 74, Subcomm. on Nat'l Parks & Public Lands, Nat'l Parks & Public Lands, Comm. on Interior & Insular Affairs*, 100th Cong., 2d Sess. (Feb.4, 1988) (Testimony of J. J. Walter, President, Nat'l Trust).

[4] *See, e.g., Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 746 F. Supp. 1334 (N.D. Ill. 1990), *rev'd*, 941 F.2d 525 (7th Cir. 1991), *on remand*, 811 F. Supp. 1300

For the reasons stated above, *amici curiae* respectfully request that this Court grant their motion to file the attached brief in support of the petition for a writ of certiorari filed by the State of California, State Lands Commission in this case.

Respectfully submitted,

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(N.D. Ill. 1992), *aff'd*, 19 F.3d 1136 (7th Cir. 1994), *cert. denied*, *115 S. Ct. 420 (1994)*; *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp. 213 (N.D. Ill. 1990), *rev'd*, 960 F.2d 665 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 491 (1993); *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992).

QUESTIONS PRESENTED

1. Whether a State's invocation of Eleventh Amendment immunity can be made contingent upon the State's ability to prove by a preponderance of the evidence that it owns the shipwreck under the Abandoned Shipwreck Act ("ASA"), 43 U.S.C. §§ 2101-2106.

2. Whether an insurance company's century-old claim to a portion of the cargo of a historic shipwreck prevents the court from treating the vessel and its cargo as abandoned, within the meaning of the ASA.

3. Whether the ASA preempts the application of state preservation laws protecting historic shipwrecks on state submerged land.

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INTERESTS OF *AMICI CURIAE*

The National Trust for Historic Preservation in the United States (hereinafter the "National Trust") was chartered by Congress in 1949 as a private nonprofit corporation to facilitate public participation in historic preservation and to further the historic preservation policies of the United States. 16 U.S.C. § 468. Additional information describing the National Trust, the Advisory Council on Underwater Archaeology, the Council of American Maritime Museums, the Institute of Nautical Archaeology, the National Conference of State Historic Preservation Officers, the North American Society for Oceanic History, the Society for American Archaeology, the Society for California Archaeology, the Society for Historical Archaeology, and the Society of Professional Archeologists is included in the Appendix.

Recognizing that the irreplaceable maritime legacy of historic shipwrecks throughout the United States was being unnecessarily damaged or destroyed through unregulated salvage, the National Trust and co-*amici* organizations actively supported passage of the Abandoned Shipwreck Act of 1987 (hereinafter "ASA" or "the Act"), 43 U.S.C. §§ 2101-2106, in order to clarify the states' ability to protect historic shipwrecks.

The National Trust and many of the co-*amici* groups have previously participated as *amici* in cases involving historic shipwrecks and the ASA.[1] The National Trust has also monitored litigation concerning historic shipwrecks both before

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[1] *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 746 F. Supp. 1334 (N.D. Ill. 1990), *rev'd,* 941 F.2d 525 (7th Cir. 1991), *on remand,* 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd,* 19 F.3d 1136 (7th Cir. 1994), *cert. denied,* 115 S. Ct. 420 (1994); *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp. 213 (N.D. Ill. 1990), *rev'd,* 960 F.2d 665 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 491 (1993); *United States v. Steinmetz,* 973 F.2d 212 (3d Cir. 1992).

and after the passage of the ASA and has a unique national perspective on the Act and its judicial interpretation throughout the country. Thus, the National Trust and co-*amici* have a substantial interest in the validity and effectiveness of the Abandoned Shipwreck Act and other federal and state historic preservation laws.

STATEMENT OF THE CASE

A. Shipwrecks Are Sensitive Archeological Resources, Which Contain Unique Historical Information.

Historic shipwrecks are veritable time capsules of our heritage. Each one of these sites represents a discrete moment in time. Because it lies undisturbed until discovery, a historic shipwreck provides an important glimpse of the past—a tableau that tells us about a ship, its cargo, and the lives of its crew and passengers. The study of these sites provides valuable information about maritime history and technology, international and regional trade, and the seafaring life.

Beginning in the 1960's, innovations in technology made underwater exploration possible, and led to the discovery of historic shipwrecks on a much greater scale than previously envisioned. Archeologists and historians began to excavate shipwreck sites in accordance with scientific standards, uncovering new information about maritime history and material culture, and making this information available for public interpretation. At the same time, treasure salvors began to realize the possibility of reaping pecuniary gain from the sometimes immense monetary value of the artifacts located in shipwreck sites. *See, e.g., Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

Inappropriate salvage of these wrecks, however, can easily result in the loss or destruction of this priceless legacy. Where recovery techniques fail to preserve and document a vessel's

contents, archeologists lose crucial pieces of the complex puzzle that tells the story of a vessel and its times. Where proper conservation techniques are not applied to the vessel and its contents, the rapid deterioration of ancient materials exposed to surface conditions makes it impossible for archeologists to glean accurate scientific and historical information from the remains. Once lost, these resources can never be recovered or replaced.

Too often, historic shipwrecks are exploited for their monetary value, and either intentionally looted or inadvertently destroyed by commercial treasure salvors, without any consideration for their character as irreplaceable historic and cultural resources. Even the best-intentioned treasure salvors do not place archeology as their primary priority. The goal of commercial salvors is maximizing their financial return, not recovering and preserving historically significant artifacts.

B. Congress Passed the Abandoned Shipwreck Act of 1987 to Protect Historic Shipwrecks.

Congress enacted the Abandoned Shipwreck Act of 1987 in response to increasing conflicts over the potential uses of historic shipwrecks, along with increasing confusion concerning the appropriate judicial forum and legal principles for resolving these conflicts.[2] Congress determined that historic abandoned shipwrecks were most appropriately owned

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[2] *See Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel*, 577 F. Supp. 597, 608 (D. Md. 1983); *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985). *Contra, Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981); *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982).

and managed by the states, which have expertise and established programs for the management of historic resources.[3] Congress' intent was to clarify the states' ability to exercise stewardship over these resources, so that the states would no longer be required to squander their time and money defending their claims to historic shipwrecks in federal admiralty courts. S. Rep. No. 241, 100th Cong., 1st Sess. 3 (1988).[4]

Under the ASA, the federal government asserted title to certain historic shipwrecks and transferred that title to the states on whose submerged lands the shipwrecks are located. 43 U.S.C. § 2105. A shipwreck meets the requirements of the ASA if it is (1) abandoned; (2) located in or on a state's submerged lands; and (3) either embedded in the sea floor or determined eligible for listing in the National Register of Historic Places. *Id.* The states regulate historic shipwreck sites by requiring salvors to excavate the sites in accordance with professional archeological standards, which would not be required by admiralty courts. *See Moyer v. Wrecked & Abandoned Vessel, Known as the Andrea Doria*, 836 F. Supp.

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[3] All 50 states have programs of cultural resource management, and at the time the Act was passed, at least 28 states had specific laws relating to the treatment of underwater archeological resources. *See* H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 2 (1988). Forty states now have established programs for the protection of historically significant shipwrecks. For a listing of the state statutes, *see* Petition of State of California, note 5 at 14-15.

[4] "The States spend a disproportionate amount of effort and expense in admiralty court arguing for jurisdiction over the shipwrecks on their State-submerged lands. Admiralty law . . . was designed to encourage the retrieval of commercial goods, not the protection of cultural resources." 134 Cong. Rec. H1178, 1183 (Mar. 28, 1988) (remarks of Rep. Vento).

1099, 1107 (D.N.J. 1993).

Prior to the ASA, states successfully argued that the Eleventh Amendment should act as a bar to admiralty *in rem* cases in federal court, because the salvors were essentially suing the state without its consent. Relying on this Court's decision in *Treasure Salvors*, 458 U.S. 670 (1982), courts held that, if a state could show a colorable claim to a shipwreck, the federal court lacked jurisdiction because of the state's Eleventh Amendment immunity. States typically asserted title to the shipwrecks through their own preservation statutes and the Submerged Lands Act of 1953. *See Subaqueous Exploration v. Unidentified Wrecked Vessel*, 577 F. Supp. 597, 608 (D. Md. 1983). It was understood that the Eleventh Amendment would continue to provide the states with immunity from suit in federal court over these claims, just as it had prior to the ASA. *See* H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 2-3 (Mar. 28, 1988).

However, since the ASA's enactment, commercial salvage companies have repeatedly challenged the validity and applicability of the ASA. This Court's review is needed to resolve widespread confusion and inconsistency among the federal courts regarding the ASA's interpretation.

C. The Shipwreck of the *Brother Jonathan*

The *Brother Jonathan* was a sidewheel steamer built in 1850 for use on the California Gold Rush trade routes. Its design was a significant departure from earlier ocean-going steamships, bridging the transition from the sailing ship-inspired hulls of earlier steam vessels to a straight-stemmed hull common to later steamship design.

The *Brother Jonathan* became part of Commodore Cornelius Vanderbilt's fleet in 1852, and carried cargo and passengers between Nicaragua and San Francisco. Later, the *Brother Jonathan* played a significant role in the development

of San Francisco and other Pacific coast ports, beginning with the discovery of gold in British Columbia in 1858, and contributed to the logging, mining, farming, and industrial economic base along the Pacific coast. The *Brother Jonathan* also carried the first group of emigrating black Californians escaping persecution in the years leading up to the Civil War. Finally, on July 30, 1865, while on a voyage from San Francisco to Puget Sound, the *Brother Jonathan* struck a submerged rock off the coast near Crescent City, California, and sank in less than one hour.

The wreck of the *Brother Jonathan* is believed to be the best preserved of any Gold Rush steamer on the Pacific Coast. The remains are located approximately four miles off the California coast, at a depth of some 250 feet. The site stabilization process was apparently gentle and gradual. The appearance of the wreck is that of a vessel that sank more or less intact, leaving many artifacts in their original places. Some of the artifacts already visible include a ceramic gun bottle, a dark glass wine bottle, and ceramic plates with New York maker's marks, as well as rows of other plates, bowls, and a chamber pot. Largely intact, the *Brother Jonathan* has a high level of archeological integrity and value for research purposes.

Because of its unique design, the role it played in the Gold Rush trade routes of our country, and the integrity of its well-preserved remains, the *Brother Jonathan* has been determined eligible for the National Register of Historic Places and is a California Registered Landmark. In addition to its significance in maritime, social, and economic history, the *Brother Jonathan* is also significant for a more poignant reason. The 1865 shipwreck resulted in tremendous loss of life; 225 people died in what is considered the greatest maritime disaster in California waters.

D. Proceedings Below

The respondent in this case, Deep Sea Research, Inc. (DSR), is a commercial salvor. DSR discovered the remains of the *Brother Jonathan* in late 1993. In 1994, DSR filed an *in rem* action seeking title and salvage rights under admiralty law in federal district court. The State of California and California State Lands Commission intervened and entered a restricted appearance for the purpose of asserting that it has a colorable claim of ownership to the shipwreck, and that as a result, the district court was barred by the Eleventh Amendment from adjudicating the *in rem* admiralty claim asserted by DSR.

The district court denied the state's motion to dismiss, holding that the state must prove its claim to the shipwreck by a preponderance of the evidence, and that it had failed to do so. *Deep Sea Research, Inc., v. Brother Jonathan*, 883 F. Supp. 1343, 1349 (N.D. Cal. 1995). On appeal, the Ninth Circuit affirmed the district court's holding that the shipwreck was not abandoned,[5] *Deep Sea Research, Inc., v. Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996), thereby allowing DSR to circumvent the authority of the State of California to protect the *Brother Jonathan* as an archeological site for the benefit of the public.

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[5] The district court had also ruled that the State did not prove by a preponderance of the evidence two other elements of a colorable claim under the ASA — that the *Brother Jonathan* was "embedded," or that it was eligible for listing in the National Register of Historic Places. *Deep Sea*, 883 F. Supp. at 1357. The Ninth Circuit cited facts that contradicted the district court's findings on those two issues, but declined to reach the issues formally in its opinion. *Deep Sea*, 102 F.3d at 389. The court also declined to reach DSR's argument that the ASA is unconstitutional. *Id.*

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision will effectively force states to litigate their claims to historic shipwrecks in federal admiralty courts—the exact opposite of Congress' intent in passing the Abandoned Shipwreck Act. The Ninth Circuit held that the state must prove, by a preponderance of the evidence, that a shipwreck is abandoned and, therefore, that the ASA applies, prior to claiming immunity under the Eleventh Amendment. Contrary to the purpose of the ASA, which was to clarify that states have title to shipwrecks, the Ninth Circuit required "a more extensive showing" by the state under the ASA than was required prior to the Act. *Deep Sea*, 102 F.3d at 386. The Ninth Circuit opinion conflicts directly with the Seventh and First Circuits on the standard of proof needed to establish Eleventh Amendment immunity.

The Ninth Circuit's opinion not only undermines the states' Eleventh Amendment immunity by imposing an unduly onerous burden of proof on the state, but also undermines the ASA itself by adopting a definition of *abandonment* that is inconsistent with the definition applied in other circuits. In examining whether the shipwreck was abandoned, the Ninth Circuit stated that it was adopting a definition of *abandonment* derived from traditional maritime law, which is the standard Congress intended. However, the court effectively created a new standard for abandonment, which will make it virtually impossible for states to assert title to historic shipwrecks. The court created this new standard by (1) relying on technological developments as a basis for precluding a finding of abandonment; and (2) inappropriately treating a partially insured shipwreck as a "unified *res*." *Deep Sea*, 102 F.3d 380.

The Ninth Circuit also erroneously held that the ASA preempts the application of state archeological preservation laws to the extent that they are broader than the ASA, thus

eliminating the basis for any other colorable claim the state may have had, and further undermining the state's preservation laws.

The effect of the court's decision below will be to return the law of historic shipwrecks to an era of confusion and unnecessary litigation, jeopardizing the ability of the states to protect these valuable historic resources.

I. The Ninth Circuit Has Imposed an Inappropriate Burden of Proof Under the Eleventh Amendment That Conflicts with Other Circuits.

This case presents a fundamental issue of federalism concerning the relationship between federal admiralty jurisdiction and state sovereign immunity under the Eleventh Amendment. At stake is whether a state's invocation of Eleventh Amendment immunity in an admiralty case for title to a shipwreck must be contingent upon the state's ability to prove, by a preponderance of the evidence, that it owns the shipwreck under the Abandoned Shipwreck Act.

The effect of the opinion below is to further a division among the circuits and to create precedent that is inconsistent with this Court's holding in *Treasure Salvors*, 458 U.S. 670 (1982).[6] The Ninth Circuit's opinion confuses both Eleventh Amendment and ASA jurisprudence. It also conflicts with the Seventh and Third Circuits on the issue of whether a state must prove a colorable claim of title by a preponderance of the evidence or whether the examination of the claim's merits is barred by the Eleventh Amendment.

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[6] In *Treasure Salvors*, the plurality opinion stated that the federal court did not have the power to adjudicate the state's interest in property from a historic ship without the state's consent. *Id.* at 682. Four Justices dissenting in part, would have given the state even greater deference. *Id.* at 703.

The Seventh Circuit has been deferential to states' rights and recognizes that the federal courts lack jurisdiction to adjudicate the merits of state claims to immunity under the Eleventh Amendment in ASA cases. *Zych v. Unidentified, Wrecked & Abandoned Vessel Believed to be the SB "Lady Elgin,"* 960 F.2d 665, 670 (7th Cir. 1992) ("The strength of the state's legal position is irrelevant; the eleventh amendment prevents the district judge from exercising jurisdiction."). The Seventh Circuit's view is also consistent with pre-ASA case law, which allowed only a minimal examination of the merits in determining jurisdiction,[7] and it has been followed in the Third Circuit. *Sunken Treasure, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, 857 F. Supp. 1129 (D. St. Croix 1994).

The Ninth Circuit departed from the approach of the Seventh and Third Circuits and raised the Eleventh Amendment immunity standard to proof by a preponderance of the evidence. In determining whether the state had a colorable claim to title, the court essentially adjudicated the underlying ownership claim. The Sixth Circuit has followed the Ninth Circuit's decision, also requiring the state to prove its right to Eleventh Amendment immunity by a preponderance of the evidence. *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997).

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[7] Unless the state waived its right to immunity, pre-ASA courts typically refrained from examining the merits of the case. *See Fitzgerald v. Unidentified Wrecked & Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989) (Eleventh Amendment immunity is a bar to federal court jurisdiction "irrespective of the actual merit of [the] claim to the salvaged shipwreck and its treasures."). The Ninth Circuit distinguished *Marx v. Guam*, 866 F.2d 294 (9th Cir. 1989), because it was not an ASA case, holding that a more extensive showing is required under the ASA. *Deep Sea*, 102 F.3d at 386.

II. This Court's Review is Needed to Resolve the Unsettled Interpretation of "Abandonment."

A. Congress Intended that Abandonment Could be Shown by Passage of Time.

As its name indicates, the Abandoned Shipwreck Act applies only to abandoned shipwrecks. Congress chose to limit the ASA to abandoned shipwrecks because it was attempting to define a class of shipwrecks that would be historic.[8] Congress recognized that abandonment could be inferred from the passage of time,[9] and intended that an express statement of abandonment by the original owner should not be required.[10]

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[8] In the absence of specific knowledge about undiscovered shipwrecks, Congress chose to define the shipwrecks covered by the Act through the use of characteristics common to historic shipwrecks, such as being embedded in the seabed or in coralline formations. Congress also included shipwrecks on submerged lands, if they are eligible for inclusion in the National Register of Historic Places. *See Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 811 F. Supp. 1300, 1315-16 (N.D. Ill. 1992).

[9] 43 U.S.C. § 2101(b) ("[I]ncluded in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.").

[10] *See* H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 1, at 2:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never

In using the term, Congress relied on the definition of *abandoned* in the admiralty case law at the time. *See* 134 Cong. Rec. H1178, 1180-81 (Mar. 28, 1988) (statement of Walter B. Jones). Admiralty courts either applied the law of finds or the law of salvage to historic shipwrecks. The law of finds applies to shipwrecks that have been abandoned, while the law of salvage applies if the shipwrecks have not been abandoned and the owner could be identified. The result of this distinction is that, under the law of finds, the finder of the shipwreck would be given title. Under the law of salvage, the finder or salvor would only be given a salvage award, enforceable against the owner through a lien on the ship.

Although admiralty courts traditionally favored the application of salvage law, they began to apply the law of finds in order to avoid the absurd fiction that an owner of a long-lost shipwreck still existed. *Treasure Salvors, Inc. v. Unidentified & Wrecked Sailing Vessel,* 569 F.2d 330, 337 (5th Cir. 1978). Congress therefore drafted the ASA to apply to *abandoned* shipwrecks, intending the Act to reach and protect all historic shipwrecks, unless title had not been relinquished, as with modern shipwrecks.

The guidelines issued by the National Park Service in accordance with the ASA provide "*Abandoned* shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person."[11] Unfortunately, salvors have attempted to chip

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asserting any control over or otherwise indicating his claim of possession of the shipwreck. *Id.*

[11] 56 Fed. Reg. 50,120 (Dec. 3, 1990) (emphasis added). The Guidelines, which were designed to be consistent with the intent and purpose of the Act, indicate that shipwrecks are generally abandoned if the owner fails to notify the Coast Guard or the U.S. Army Corps

away at the definition of abandonment and have significantly weakened the application of the ASA.

B. The Circuits Interpret and Apply "Abandonment" Inconsistently.

Courts have applied the term "abandonment" in an inconsistent manner, accepting similar evidence in seemingly similar cases and reaching dramatically different results. The Ninth Circuit below adopted a definition of abandonment that contradicts Congress' intent under the ASA and conflicts with the definitions applied by other circuits. This Court's review is needed to resolve the conflicting interpretations of abandonment because the resulting confusion significantly undermines the ability of the states to regulate the historic resources entrusted to them by Congress in the ASA.

On one end of the spectrum in defining "abandonment" are the Seventh and Third Circuits. These courts generally follow the traditional interpretation under admiralty law, allowing for a presumption of abandonment under some circumstances.[12] *See Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Seabird,"* 941 F.2d 525 (7th Cir. 1991); *Sunken Treasure*, 857 F. Supp. at 1129.

At the other end of the spectrum is the definition of

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of Engineers within 30 days. *Id.*

[12] Courts typically state that they are following the traditional admiralty definition of abandonment used before the ASA, which is what Congress intended, citing *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (abandonment when "articles have been presumptively abandoned, i.e., either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title").

abandonment adopted by the Fourth Circuit in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992),[13] which held that clear and convincing evidence of abandonment is required, ideally by express renunciation. If a previous owner comes forward, the Fourth Circuit would not allow an inference of abandonment. *Id.* at 464-65. The Ninth and Sixth Circuits have criticized the Fourth Circuit's standard as departing from traditional maritime law. *Deep Sea*, 102 F.3d at 388; *Fairport Int'l*, 105 F.3d at 1085. However, in practice, the Ninth and Sixth Circuits themselves have departed from the traditional standard in divergent ways.

Although the Ninth Circuit below stated that it was following the traditional standard of abandonment, it actually staked out a new position on the spectrum, finding that the *Brother Jonathan* was not abandoned, based on a shred of evidence—a century-old newspaper article and two assignments of title from insurance companies solicited by the salvor.[14] Even within the traditional standard for abandonment, the application of the term is inconsistent.[15]

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[13] *Columbus America* was not an ASA case because the shipwreck was outside the state's territorial waters, but the court discusses abandonment at length.

[14] In contrast, the Seventh Circuit did not find abandonment under the traditional rule because the records expressly indicated that the insurance company did not intend to abandon its interest. *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp. at 215.

[15] In yet another case, similar evidence was held to be insufficient to prevent a determination of abandonment. In *Moyer v. Wrecked & Abandoned Vessel, Known as the Andrea Doria*, 836 F. Supp. 1099, 1105 (D.N.J. 1993), the insurance company had paid claims on a

The Ninth Circuit also disavowed the standard enunciated by the Fourth Circuit in *Columbus-America*, which requires clear and convincing evidence of abandonment. However, in *Columbus-America*, there was far greater evidence that the shipwreck was not abandoned, including evidence that the insurance companies had initiated salvage efforts shortly after the vessel sank, that the insurers had entered negotiations to contract with salvors in the interim 130-year period, and that they negotiated with several different salvors in recent years. *Columbus-America*, 974 F.2d at 457-58.[16]

C. The Ninth Circuit's Reliance on Increased Technology and on Partial Insurance Coverage to Defeat a Finding of Abandonment Fundamentally Undermines the ASA.

The Ninth Circuit also held that abandonment cannot be inferred if the technology did not exist for the original owners to salvage the shipwreck. *Deep Sea*, 102 F.3d at 388. This holding is inconsistent with Congress' intent. Congress passed the ASA expressly to resolve the disputes brought about by the increased use of new technology.[17] If courts accept the

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1956 shipwreck but was held to have abandoned its interests in part because it had not engaged in continuing negotiations with salvors and had rejected salvage offers.

[16] Despite this showing, the district court in *Columbus-America*, held the shipwreck *had* been abandoned. *Id.* at 459.

[17] "As new technologies have allowed the recovery of wrecks that have been lost for long periods of time, a new concern has been developed for the historic and recreational interests in shipwrecks." S. Rep. No. 241, 100th Cong., 1st Sess. 6 (1988); *see also* H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 1, 1 (1988); 134 Cong. Rec. H1178, 1183 (Mar. 28, 1988) (remarks of Rep. Vento).

argument that abandonment cannot be inferred because salvage was technologically infeasible, the entire purpose of the ASA will be defeated. This argument is particularly troubling when applied to the *Brother Jonathan* because, in contrast to other shipwreck cases involving insurance company claims, the only evidence the Ninth Circuit relied on to presume the insurance companies' continued ownership interest was their prior inability to attempt salvage, the very inactivity that should be used to infer abandonment under the traditional rule.[18]

In another departure from other circuits, the Ninth Circuit found that assignment of a mere portion of the cargo to DSR was sufficient evidence that the ship had not been abandoned.[19] The court held that, even though the salvors only had a claim to a portion of the ship's cargo, the wreck must be adjudicated as a unified *res*. *Deep Sea*, 102 F.3d at 389. The effect of the Ninth Circuit's decision is to prevent the state from knowing whether the wreck is abandoned *until after the salvor has excavated the wreck.*[20]

This holding, as the Ninth Circuit itself notes, is inconsistent with the other circuits that have examined the issue. In *Columbus-America*, 974 F.2d 450, the Fourth Circuit found that, although the vessel itself was abandoned, the insured portions of the cargo were not.[21] *Id.* at 468. The Ninth Circuit's decision is also inconsistent with other cases that treat the cargo and personal belongings on a vessel as separate and distinct so that they may be salvaged independent of one another. *See Bemis v. RMS Lusitania*, 884 F. Supp. 1042 (E.D. Va. 1995), *aff'd mem.*, 99 F.3d 1129 (4th Cir. 1996).[22]

The Ninth Circuit's determination that the shipwreck should be treated as a unified *res* on the basis of partial payment of insurance claims directly conflicts with the ASA guidelines issued by the Secretary of the Interior. The guidelines state that a vessel is not abandoned "when the owner

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[18] *Zych*, 755 F. Supp. 213 (N.D. Ill. 1990) exemplifies salvors' use of insurance claims to obtain title to shipwrecks and to circumvent the ASA. In that case, the salvor initially brought an action for title to the *Lady Elgin* under the law of finds, challenging the constitutionality of the ASA. Later, he contacted an insurance company that reputedly paid claims on the *Lady Elgin*, and convinced the company to assign its subrogation rights to a private foundation that he had formed specifically for that purpose. *Id.* at 214.

[19] The original newspaper articles indicated that only one-third of the cargo was ever insured. *Deep Sea*, 883 F. Supp. at 1347. Furthermore, the vessel itself was not insured and no claim of title for the vessel has been filed other than the state's limited appearance raising its Eleventh Amendment immunity. *Id.*

[20] The court reserved the question of whether at some point the insured portion of the wreck becomes so negligible that the wreck might be considered abandoned for the purposes of the ASA. *Deep Sea*, 102 F.3d at 389.

[21] The dissenting opinion in the Fourth Circuit pointed out that "the insurers only became owners of the cargo to the extent of the claims they paid," and the newspaper articles provide evidence only of the amount insured, not the claims paid. *Columbus-America*, 974 F.2d at 478 (Widener, J., dissenting).

[22] In *Bemis*, the salvor had secured title to the *hull* of the ship from the insurance company that had paid the claims following the sinking of the vessel. The salvor sought title to the cargo and personal belongings through the subrogation rights to the hull. The court denied his claim, explaining that Cunard Lines never had a legal interest in the cargo or belongings and could not transfer rights to which it had no title. 884 F. Supp. 1042 (E.D. Va. 1995).

of a sunken vessel is paid the *full* value of the vessel." Abandoned Shipwreck Guidelines, 55 Fed. Reg. 50,116, 50,120-21 (1990) (emphasis added). Thus, abandonment may be found even if there has been partial payment of insurance claims.

The Ninth Circuit's decision creates further confusion and inconsistency in the application of the ASA, negating the ability of states to preserve shipwrecks that lie on their submerged lands. This Court's review is needed to clarify the definition of abandonment and the appropriate burden of proof.

III. The Ninth Circuit Erred in Holding that the Abandoned Shipwreck Act Preempts California's Submerged Archeology Statute.

The Ninth Circuit held that California's statute protecting submerged archeological sites[23] is preempted by the ASA because it covers a broader range of resources than those covered by the ASA,[24] and to that extent, the state statute did not provide an independent basis for a colorable claim under the Eleventh Amendment. *Deep Sea*, 102 F.3d at 384. The court invalidated the California statute "to the extent that it gives the state title to shipwrecks that do not meet the requirements of the ASA." *Id.* The Ninth Circuit's reasoning

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[23] This statute provides: "title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California is vested in the state." CAL. PUB. RES. CODE § 6313(a).

[24] The court held the California statute included resources not covered by the ASA because the State statute covers sites that are 50 or more years old. However, the regulations governing eligibility for the National Register of Historic places also include a general requirement that all sites be 50 years old. 36 C.F.R. § 60.4(g).

was that "Congress intended to transfer title to the states only for shipwrecks that meet the requirements of the ASA. All other shipwrecks continue to be subject to the exclusive admiralty jurisdiction of the federal courts as provided by Article III, section 2 of the United States Constitution." *Id.*

The court's preemption analysis fails to acknowledge the overarching intent of the ASA, which was to confirm states' preexisting claims to ownership of abandoned shipwrecks so that the states can manage the shipwrecks as archeological and recreational sites. 43 U.S.C. §§ 2101, 2103; *see also* S. Rep. No. 241, 100th Cong., 1st Sess. 3-4 (1987); H. R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 8 (Mar. 28, 1988).

The debates in Congress highlight Congress' intention, as well as its knowledge and acceptance of state activity in the field. As one of the key sponsors of the bill stated with approval:

> The States also are not operating in a vacuum in this area. Based on their interpretation of the 1953 Submerged Land Act, some 27 States have developed laws and programs that pertain to the management of historic shipwrecks. Many of the States have written to me expressing their intention of continuing to implement these same laws and programs even after the passage of Federal legislation confirming their title to abandoned shipwrecks.

134 Cong. Rec. H1178, 1180 (Mar. 28, 1988) (Statement of Rep. Walter B. Jones). Even opponents of the ASA recognized that the law was not intended to displace existing state law, but only to strengthen its enforceability. *See Id.* at H1179-80 (remarks of Rep. Shumway).

Other courts, instead of holding that the ASA preempts state statutes, have treated the states' claims of ownership under their own statutes as potentially valid alternative claims for Eleventh Amendment purposes. *See Zych*, 960 F.2d at 669;

Zych, 746 F. Supp. at 1343. These courts have correctly recognized that, rather than preempting state regulation, the ASA was intended as an intentional "waiver of preemption" by Congress. *Zych*, 941 F.2d at 533.

CONCLUSION

The decision of the Ninth Circuit returns the law governing historic shipwrecks to the confusion and jurisdictional conflicts that Congress sought to correct in the Abandoned Shipwreck Act of 1987. This Court's review is necessary to resolve the conflicts among the circuits and to enable the states to protect their archeological resources. Thus, for the reasons discussed more fully above, *amici curiae* respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Interests of *Amici Curiae* Organizations

National Trust for Historic Preservation

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a private charitable, educational, and nonprofit organization to "facilitate public participation in the preservation of sites, buildings and objects significant in American history and culture," and to further the purposes of federal historic preservation laws. 16 U.S.C. §§ 461, 468. The National Trust has grown to include more than 265,000 individual members and approximately 3,500 member organizations, as well as operating seven regional and field offices.

Through its Legal Defense Fund, the National Trust advocates to secure judicial, administrative, and legislative decisions that uphold the validity and effectiveness of regulatory protections for historic resources throughout the United States. The National Trust has a particular interest in the protection of historic shipwrecks. The National Trust actively supported the passage of the Abandoned Shipwreck Act of 1987 and has participated as *amicus* in cases challenging its legality and effectiveness. The National Trust has participated in more than 100 federal and state court cases over the past quarter century.

Advisory Council on Underwater Archaeology

The Advisory Council on Underwater Archaeology ("ACUA") is an elected body of leaders of the field of underwater archeology and is associated with the Society for

Historical Archaeology. The purposes for which the ACUA is organized are to preserve and protect underwater archeological sites, to encourage maintenance of the highest ethical and research standards in underwater archeology, and to educate the general public and sport diving community about the need for conservation of underwater archeological resources. ACUA encourages the publication of underwater archeological research and the distribution and dissemination of information concerning archeological matters. The organization also sponsors and publishes the proceedings of an annual Conference on Underwater Archaeology.

Council of American Maritime Museums

The Council of American Maritime Museums ("CAMM") exists to uphold, promote and further the welfare, programs and activities of maritime museums in the Western hemisphere. To these ends, CAMM works to insure that high professional standards are adhered to in the preservation and interpretation of maritime history, collections, sites and vessels. CAMM also encourages cooperation between member museums in research and loan exhibits, jointly sponsors publications, and promotes public awareness of itself and the interests of its members. In addition, CAMM lobbies on legislation and government actions affecting its members.

Institute of Nautical Archaeology

The Institute for Nautical Archaeology is an academic and scientific institution dedicated to the excavation, study and preservation of shipwrecks of historic and pre-historic significance. The Institute faculty is comprised of practicing archeologists engaged in projects involving shipwrecks in United States waters, the Caribbean Sea, the Mediterranean Ocean, the Azores Islands, Kenya, Eritrea and elsewhere. In the United States, the Institute has participated in projects

involving shipwrecks in the James River, the Gulf of Mexico and the Great Lakes. The Institute has a vital interest in the preservation of ships subject to the Abandoned Shipwreck Act for academic study, recovery and museum display.

National Conference of State Historic Preservation Officers

The National Conference of State Historic Preservation Officers ("NCSHPO") is a non-profit, professional organization representing the State Historic Preservation Officers in the 59 States, territories and the District of Columbia. The role of NCSHPO in the administration of the national historic preservation program was recognized in the 1980 amendments to the National Historic Preservation Act. 16 U.S.C. § 470. NCSHPO encourages research and development concerning historic preservation programs, as well as legislative proposals for the implementation of programs at the state and federal levels. NCSHPO actively supported the passage of the Abandoned Shipwreck Act of 1987.

North American Society for Oceanic History

The North American Society for Oceanic History ("NASOH"), incorporated in 1974, is a not-for-profit organization whose members include curators of maritime museums and history professors across the U.S. and in Canada. The goals of the organization include the research and promotion of maritime history. NASOH sponsors a annual conference at which members present scholarly papers and the organization rewards outstanding publications on maritime history and nautical archaeology. For several years, NASOH has also worked on behalf of the preservation of historic shipwrecks.

Society for American Archaeology

The Society for American Archaeology ("SAA") is a scholarly organization of professionals whose objective is to encourage new research and interpretation of the archeological record in the Americas. Other goals of the organization include education, public communication, and the protection of resources. To disseminate information, SAA holds annual meetings and publishes *American Antiquity*, a journal of papers on the archeology of the Western Hemisphere and closely related subjects. SAA is also involved in legislative action and government relations affecting the discipline of archeology.

Society for California Archaeology

The Society for California Archaeology ("SCA") is a non-profit organization founded in 1966 and dedicated to the research, understanding, conservation, interpretation and protection of California's archeological heritage. Today, SCA has approximately 800 members, including professional archeologists employed by universities and colleges, government agencies, museums and research institutions, utility companies, and private consulting firms. SCA members also include student and avocational archeologists, Native American scholars, historians, environmental planners, and members of the general public. SCA holds an annual conference and two annual data-sharing meetings in both northern and southern California, as well sponsoring the annual California Archaeology Week. The organization publishes a quarterly newsletter on annual proceedings, and produces an occasional publication series.

Society for Historical Archaeology

The Society for Historical Archaeology ("SHA") is the largest professional organization of scholars concerned with the

archeology of the modern world (from A.D. 1400 to the present). SHA is concerned with the identification, excavation, interpretation and preservation of sites and artifacts from both the land and underwater. The organization annually sponsors the international Conference on Historical and Underwater Archaeology and publishes the proceedings entitled *Underwater Archaeology* each year with the assistance of the Advisory Council on Underwater Archaeology. The great significance of historic shipwrecks lead SHA to strongly support Congress' enactment of the Abandoned Shipwreck Act of 1987.

Society of Professional Archeologists

The Society of Professional Archaeologists ("SOPA") is a national non-profit association of more than 700 professional archeologists. SOPA seeks to define professionalism in the field, to establish national standards for archeological practices, research and performance, and to identify those individuals who possess the ability and willingness to meet those standards. The organization maintains standards for various archeological specialities including underwater archeology. Also, SOPA serves to represent the profession working with other professional organizations, governmental agencies and private enterprises to further the goals of archeology. SOPA strongly supported Congress' enactment of the Abandoned Shipwreck Act of 1987, as an important and needed measure for ensuring that these fragile and irreplaceable resources are appropriately preserved and managed as cultural and archeological sites.